IN THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 97-2818

ROBERT LICKISS,

Plaintiff-Appellee,

v.

MARY DREXLER, formerly the Sheriff of Tazewell County, and RALPH HODGSON, Sheriff of Tazewell County,

Defendants-Appellants.

Appeal from the United States District Court
for the Central District of Illinois.
No. 95 C 1121—**Michael M. Mihm**, *Chief Judge.*

ARGUED FEBRUARY 10, 1998—DECIDED APRIL 21, 1998

Before CUMMINGS, COFFEY and MANION, *Circuit Judges.*

CUMMINGS, *Circuit Judge.* In his amended complaint filed in January 1996, Robert Lickiss sued Mary Drexler, former Sheriff of Tazewell County, Illinois, and her successor, Ralph Hodgson. Plaintiff alleged that he was hired by the County of Tazewell as a deputy sheriff in January 1983 and promoted to sergeant in September 1988. In July 1994 he received a complaint that Deputy Sheriff Michael Steinborn was then engaged in misconduct by "spending hours with his girlfriend or looking for her" and threatening himself and another person with a gun while off duty but in uniform. After receiving the complaint against Steinborn, plaintiff interviewed witnesses and took

statements from them and reported his findings to then-Sheriff Drexler and then-Chief Deputy Hodgson. Drexler instructed Lickiss to stop investigating Steinborn. Thereafter Drexler gave Steinborn two weeks off with pay and instructed him to seek counseling.

In September 1994 plaintiff was contacted by individuals who informed him that they wished to press charges against Steinborn because they were fearful for their safety and that of their family. Consequently Lickiss reported this matter to the State's Attorney and an Assistant State's Attorney of Tazewell County.

Lickiss alleged that Sheriff Drexler ordered "a massive investigation" of Lickiss after learning that he had disclosed information about Steinborn's activities. In October 1994 she suspended Lickiss without a hearing and without pay for an indefinite period while she "falsely publicly accused him of violating federal and state laws." According to plaintiff, his suspension was in retaliation for his disclosure of the misconduct of Deputy Sheriff Steinborn. Eight days later, Drexler sent Lickiss a letter confirming his suspension and advising him of her intent to terminate him. A month thereafter she notified plaintiff that she had terminated his employment. This action was two days before defendant Hodgson became Sheriff. Lickiss' termination was allegedly in retaliation for disclosing the misconduct of Deputy Sheriff Steinborn.

On February 27, 1995, Sheriff Hodgson reinstated plaintiff as a deputy sheriff after a two-week unpaid suspension and after his demotion from sergeant to deputy sheriff. According to plaintiff, the charges against him by Drexler and Hodgson were false and made to cover up Steinborn's actions and to punish plaintiff for not participating in the cover-up. In Count I of his complaint, plaintiff alleges that his termination for investigating fellow police officer Steinborn and reporting that information to the Tazewell County State's Attorney violated his First Amendment rights. In Count II, plaintiff claims that defendants deprived him of due process of law by compensating him at

a deputy's rate of pay rather than a sergeant's rate during the period of his suspension. In closing, the plaintiff asked the court to reinstate him to his former position and rank without penalty and to expunge any adverse employment records. Lickiss sought $2 million in compensatory damages and another $2 million in punitive damages.

In December 1996 defendants filed a motion for summary judgment on Count I, claiming that their "interest in maintaining discipline, loyalty, confidentiality, and respect for departmental orders, rules and regulations outweighed any right Plaintiff claims to disregard official orders in order to investigate and speak out on the matters identified in Plaintiff's complaint." In the alternative the former Sheriff and her successor asserted they were entitled to qualified immunity.

As to plaintiff's due process claim in Count II, defendants asserted that his claim was rejected by an arbitrator and that he is simply seeking review of that decision and that he was not entitled to due process prior to his suspension.

In June 1997 Judge Mihm handed down a 21-page Order denying defendants' motion for summary judgment. The order reported that during a meeting with Assistant State's Attorney Umholtz, then-Sheriff Drexler stated that Steinborn would be required to take vacation time, receive psychiatric treatment and clearance from the psychiatrist before returning to work. She asserted that she ordered plaintiff off the case and directed him to do no further investigation. She also asked the Illinois State Department of Criminal Investigations (DCI) to investigate the situation, but it refused to do so.

Judge Mihm said that despite Lickiss' understanding he was not to be involved in further investigation of Steinborn, he delivered a supplemental report regarding it to Umholtz on August 30, 1994. Lickiss reported that Julie Frakes, sister of Steinborn's former girlfriend, Kathy Lund, advised him that Steinborn continued to visit her parents'

home after being asked to stop and that they and Lund felt scared and intimidated by Steinborn. Approximately a month later Lickiss reported Mrs. Lund's September 26, 1994 interview with him about Steinborn and her alleged dissatisfaction with Sheriff Drexler's handling of the situation. A week later the *Journal Star* published an article criticizing Drexler's handling of the Steinborn-Lund matter and adding that a similar incident had occurred between Steinborn and his ex-wife. The article quoted Lickiss as one of its sources. Because he continued to investigate the Steinborn-Lund matter and leaked information to the press, Lickiss was allegedly disciplined for insubordination. He also supported the candidate opposing defendant Hodgson's successful race for Sheriff.

Judge Mihm concluded that Lickiss' communications addressed matters of public concern, thus satisfying *Pickering v. Board of Education*, 391 U.S. 563. From the materials before it, the court concluded that plaintiff produced enough evidence to create an issue of material fact for a jury regarding Drexler's actual motivation in disciplining him. The court stated that suspension with pay pending a rehearing or a pre-suspension hearing should have been accorded Lickiss and that the post-deprivation process was constitutionally insufficient. Defendants' motion for summary judgment was denied, so that plaintiff could proceed to trial with respect to his claim for damages. We agree with this disposition.

The only issue before this Court is the district court's denial of the claim of qualified immunity. "Because qualified immunity is immunity from suit, not merely a defense to liability, and effectively is lost if a case erroneously is permitted to go to trial, the denial of qualified immunity is a final appealable order for purposes of 28 U.S.C. § 1291, if based solely on a matter of law." *Khuans v. School Dist. 110*, 123 F.3d 1010, 1012 (7th Cir. 1997) (citations omitted).

Defendants failed to provide plaintiff with a pre-suspension hearing, prior notice of suspension, notice of the

charges against him, and an opportunity to respond. Therefore his clearly established due process rights were denied. *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975). The balancing test of *Pickering v. Board of Education*, 391 U.S. 563, reiterated in *Connick v. Meyers*, 461 U.S. 138, governs this case.

Lickiss was neither a confidential employee nor a policymaker. Unlike the deputy sheriff in *Wilbur v. Mahan*, 3 F.3d 214 (7th Cir. 1993), Lickiss was not a policymaker whose enforced unpaid leave did not establish violation of his First Amendment rights. Therefore he was entitled to a pre-suspension hearing, prior notice of suspension, an opportunity to respond and notice of the charges against him. *Muscare v. Quinn*, 520 F.2d 1212 (7th Cir. 1975).

Under *Pickering* and *Connick*, it is clear that a governmental employer cannot punish a public employee for engaging in protected expression on matters of public concern under the First Amendment. The First Amendment protection of the employee in commenting upon matters of public concern is balanced against the interest of the government as employer in promoting the efficiency of the public services it performs through its employees. *Pickering*, 391 U.S. at 568; *Connick*, 461 U.S. at 142. Lickiss was entitled to raise questions about the shortcomings of the defendants' official investigation because it is a matter of public concern. *Glass v. Dachel*, 2 F.3d 733, 740 (7th Cir. 1993). Here defendants have been unable to advance any valid reason for their treatment of plaintiff. *Dishnow v. School Dist. of Rib Lake*, 77 F.3d 194 (7th Cir. 1996).

Applying the *Pickering* balancing test, it is apparent that Lickiss was not a confidential employee or policymaker, and defendants have been unable to show that plaintiff occupied that position. Unlike confidential employees or policymakers, Lickiss was hired and promoted by a Merit Commission and not under patronage. Under the applicable collective bargaining agreement, cause was required for demotion or adverse employment action, and a grievance process was provided. Unlike then-Chief Deputy Hodgson,

plaintiff was not a confidential policymaker and indeed was excluded from meetings where defendants considered the Steinborn matter. As in *O'Brien v. Town of Caledonia*, 748 F.2d 403 (7th Cir. 1984), Lickiss could not be disciplined for bringing matters of public concern to the attention of the State's Attorney. As in that case, plaintiff's calling the Steinborn matter to the attention of the State's Attorney was deserving of First Amendment protection. See also *Glass v. Dachel*, 2 F.3d 733 (7th Cir. 1993); *Gorman v. Robinson*, 977 F.2d 350 (7th Cir. 1992); *Hanneman v. Breier*, 528 F.2d 750 (7th Cir. 1976).

As the State's Attorney told Drexler, Lickiss had the duty to report the Steinborn information to him. Under the facts of record defendants' claim of qualified immunity cannot succeed. Their motion for summary judgment was properly denied. Affirmed.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

United States Court of Appeals
For the Seventh Circuit
Chicago, Illinois 60604

June 30, 1998

Before

Hon. RICHARD A. POSNER, Chief Judge
Hon. WALTER J. CUMMINGS, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. JOEL M. FLAUM, Circuit Judge
Hon. FRANK H. EASTERBROOK, Circuit Judge
Hon. KENNETH F. RIPPLE, Circuit Judge
Hon. DANIEL A. MANION, Circuit Judge
Hon. MICHAEL S. KANNE, Circuit Judge
Hon. ILANA DIAMOND ROVNER, Circuit Judge
Hon. DIANE P. WOOD, Circuit Judge
Hon. TERENCE T. EVANS, Circuit Judge

ROBERT LICKISS,	]	Appeal from the
	]	United States District
Plaintiff-Appellee,	]	Court for the Central
	]	District of Illinois.
No. 97-2818 *vs.*	]	
	]	No. 95 C 1121
MARY DREXLER, formerly	]	
the Sheriff of Tazewell County,	]	Michael M. Mihm,
and RALPH HODGSON,	]	*Chief Judge*.
Sheriff of Tazewell County,	]	
	]	
Defendants-Appellants.	]	

ORDER

On consideration of the petition for rehearing with suggestion for rehearing en banc filed by defendants-appellants on May 5, 1998, and the answer filed by

plaintiff-appellee, all of the judges on the original panel voted to deny rehearing and a majority of the active judges voted to deny rehearing en banc.* Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.

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* Judge Ilana Diamond Rovner and Judge Diane P. Wood voted to grant rehearing en banc.

[Filed June 17, 1997]

IN THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF ILLINOIS

ROBERT LICKISS,	)	
	)	
Plaintiff,	)	
v.	)	No. 95-1121
	)	
	)	
COUNTY OF TAZEWELL, et al.,	)	
	)	
Defendants.	)	

ORDER

This matter is now before the Court on Defendants' Motion for Summary Judgment. For the reasons set forth below, the Motion for Summary Judgment [#90] is DENIED.

FACTUAL BACKGROUND

For 12 years, Plaintiff, Robert Lickiss ("Lickiss"), was employed by the Tazewell County Sheriff's Department. According to Lickiss, he was an excellent employee and never received any disciplinary action during his tenure with the Sheriff's Department prior to the incident in question. Defendant Mary Drexler ("Drexler") was the Sheriff of Tazewell County until November 1994, when Defendant Ralph Hodgson ("Hodgson") won the election.[1]

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[1] Lickiss did not support Hodgson in his bid to be elected Sheriff.

In July 1994, Lickiss learned of another deputy sheriff's allegedly "gross misconduct" while off duty. Lickiss conducted an investigation of this officer, Michael Steinborn ("Steinborn"), and reported his findings to Drexler. Drexler purportedly told Lickiss to cease his investigation.[2] Later that fall, Lickiss purportedly received another complaint regarding Steinborn and contacted the State's Attorney for Tazewell County to inform him of the complaint. Upon learning that Lickiss had divulged this information to the State's Attorney, Drexler allegedly launched a "massive investigation" regarding Lickiss' conduct. On October 19, 1994, Drexler suspended Lickiss without pay for an indefinite period of time. On November 28, 1994, Drexler informed Lickiss of her decision to terminate his employment with the Tazewell County Sheriff's Department. On February 27, 1995, newly-elected Sheriff Hodgson reinstated Lickiss, converting his discipline to a ten-day suspension without pay and demotion from sergeant to patrol deputy. Issues relating to Hodgson's determination of the appropriate discipline were submitted to arbitration.

Lickiss filed this action pursuant to 42 U.S.C. §§ 1983 and 1988 on March 17, 1995. His First Amended Complaint ("Complaint") was filed on January 10, 1996. In Count I, Lickiss alleges that he was terminated in violation of his First Amendment rights for investigating a fellow police officer and reporting that information to the Tazewell County State's Attorney. Count II asserts a due process violation, in that Lickiss claims he should have received compensation at a sergeant's rate of pay

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[2] Steinborn had apparently supported Hodgson's campaign.

during the term of his suspension. Defendants have now moved for summary judgment on Count I of the Complaint, asserting that their interest in maintaining discipline, loyalty, confidentiality, and respect for departmental orders, etc., outweighed any right Lickiss claims to have regarding the actions he took. In the alternative, Defendants Hodgson and Drexler assert that they are entitled to qualified immunity. Defendants also seek summary judgment with respect to Count II of the Complaint, asserting that the issue of Lickiss' entitlement to receive compensation at a sergeant's rate during his suspension has already been determined by an arbitrator and that he was not entitled to due process prior to his suspension.

DISCUSSION

A motion for summary judgment will be granted where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party has the responsibility of informing the Court of portions of the record or affidavits that demonstrate the absence of a triable issue. *Celotex Corp. v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 2552 (1986). The moving party may meet its burden of showing an absence of material facts by demonstrating "that there is an absence of evidence to support the non-moving party's case." *Id.* at 2553. Any doubt as to the existence of a genuine issue for trial is resolved against the moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255, 106 S.Ct. 2505, 2513 (1986); *Cain v. Lane*, 857 F.2d 1139, 1142 (7th Cir. 1988).

If the moving party meets its burden, the non-moving party then has the burden of presenting specific facts to show that there is a genuine issue of material fact. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87, 106 S.Ct. 1348, 1355-56 (1986). Federal Rule of Civil Procedure 56(e) requires the non-moving party to go beyond the pleadings and produce evidence of a genuine issue for trial. *Celotex Corp.*, 106 S.Ct. at 2553. This Court must then determine whether there is a need for trial—whether, in other words, there are any genuine factual issues that properly can be resolved only by a finder of fact because they may be reasonably resolved in favor of either party. *Anderson*, 106 S.Ct. at 2511.

I. Lickiss' First Amendment Claim

It is well established that the government cannot condition public employment on some basis that impedes an employee's constitutionally protected interest in freedom of speech. *Perry v. Sinderman*, 408 U.S. 593, 92 S.Ct. 2694, 2697 (1972). In other words, public employees do not forfeit their First Amendment right to comment on matters of public interest simply by virtue of the fact that they are employed by the government. *Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731, 1734 (1968). However, the government as an employer has corresponding interests in the ability to reasonably regulate the speech of its employees. *Id.* "The first amendment . . . is not a license for insubordinate speech that impedes an employee's performance of his duties or that interferes with the proper functioning of the work-place." *Domiano v. Village of River Grove*,

904 F.2d 1142, 1145 (7th Cir. 1990). Thus, the goal is to achieve "a balance between the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138, 103 S.Ct. 1684, 1686 (1983), *citing Pickering*, 88 S.Ct. at 1734. Both issues (i.e., whether the speech is on a matter of public concern and the balancing of the respective interests of the parties under *Pickering*) are questions to be decided by the Court. *Campbell v. Towse*, 99 F.3d 820, 827 (7th Cir. 1996), *cert. denied*, 117 S.Ct. 1254 (1997).

In determining whether an employee's speech involves a matter of public concern, the Court must consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 103 S.Ct. at 1690. Here, in July 1994, Lickiss became involved in an investigation of the conduct of his fellow deputy, Steinborn. Steinborn had been dating Kathy Lund ("Lund"). When Lund attempted to end the affair, Steinborn allegedly began bothering Lund and her family. At one point, upon discovering Lund with another man, Steinborn purportedly began "beating himself in the head" and at one point is said to have put his service revolver to his head and threatened to kill himself. The next day, Lickiss reported this information to Defendants Drexler and Hodgson. Lickiss was instructed to prepare a written report for submission to then Assistant State's Attorney of Tazewell County, Stewart Umholtz ("Umholtz"). Umholtz has since become the State's Attorney of Tazewell County.

During a meeting with Umholtz, Drexler stated that Steinborn would be required to take vacation time, receive psychiatric treatment, and receive clearance from a psychiatrist before returning to work. At this time, Drexler asserts that she ordered Lickiss off the case and directed him to do no further investigation. Lickiss recalls only that he left the meeting with the understanding that he was not to have any further involvement in any investigation of Steinborn and that Drexler would ask the Illinois State Police Department of Criminal Investigations ("DCI") to conduct an investigation into the situation. Supported by a letter from the Tazewell County State's Attorney, Eric Blanc, Drexler requested assistance from DCI in conducting an internal investigation. However, DCI declined to investigate the Steinborn matter.[3]

Despite understanding that he was not to be involved in further investigation of Steinborn, Lickiss delivered a supplemental report regarding the Steinborn/Lund matter to Umholtz on August 30, 1994. In this report, Lickiss stated that Lund's sister had advised him that Steinborn continued to visit her parents' home after being asked to stop and that they felt scared and intimidated by him. On October 6, 1994, Lickiss prepared another report regarding a September 26, 1994 interview with Lund which detailed her version of the events involving Steinborn, as well as her alleged dissatisfaction with Drexler's handling of the situation.

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[3] The transcript of Blanc's deposition on July 24, 1996 indicates that DCI is reluctant to conduct internal investigations unless they believe criminal activity is involved. (Blanc Transcript at 7-8).

On October 14, 1994, the *Journal Star* published an article authored by Omar Sofradzija which criticized Drexler's handling of the Steinborn/Lund matter and represented that a similar incident had occurred between Steinborn and his ex-wife. Among other sources, the article quoted Lickiss directly, as well as his initial July 1994 report. Defendants contend that Lickiss was disciplined for insubordination, alleging that he continued to investigate the Steinborn/Lund matter in violation of a direct order from Drexler to cease his involvement in the investigation and that he leaked information to the press.

It is undisputed that Lickiss supported the candidate opposing Hodgson in the race for Sheriff and even drafted a letter to this candidate while on duty. While these facts could support the inference that Lickiss was motivated by personal or political reasons in pursuing the Steinborn/Lund matter in that he was attempting to indirectly discredit Hodgson, "the fact that an employee speaks at least in part for personal reasons will not automatically deprive [his] statements of the protections afforded to speech on a matter of public concern." *Cliff v. Board of School Com'rs of City of Indianapolis*, 42 F.3d 403, 410 (7th Cir. 1994); *Campbell*, 99 F.3d at 827.

The evidence establishes that the heart of the Steinborn/Lund situation involved an apparently unstable officer and the improper use of his service revolver, which would raise legitimate concerns for public safety.[4]

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[4] Defendants concede that whether Lickiss' conduct related to a matter of public concern is not properly resolvable in a

(continued...)

When viewed in the light most favorable to Lickiss, the facts also raise issues of public trust regarding the conduct of Defendants with respect to the Steinborn investigation and are such that reasonable minds could infer that the Sheriff's Department was not discharging its governmental responsibilities by conducting a thorough investigation of Steinborn. The record before the Court demonstrates that while Lickiss may have acted in part for personal or political reasons as a result of his opposition to Hodgson's candidacy, he has also set forth sufficient evidence that he desired to air the merits of the issue and address Defendants' methods of investigating an allegation that one of their officers was unstable and possibly violent towards both himself and others. Thus, one could reasonably conclude that Lickiss' communications addressed matters of public concern, and the first prong of the *Pickering* analysis is satisfied.

Additionally, in order to be protected by the First Amendment, Lickiss' "interest in expressing [himself] on this matter must not be outweighed by any injury the speech could cause to 'the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.'" *Waters v. Churchill*, 114 S.Ct. 1878, 1884 (1994). The government's power to restrict speech by its employees in its mission as an employer is greater than its ability to impose restraints on public speech when acting as sovereign. *Id.*

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[4] (...continued)
motion for summary judgment. (Defendants' Memorandum of Law in Support of Defendants' Motion for Summary Judgment at 2.)

> Government agencies are charged by law with doing particular tasks. Agencies hire employees to help do those tasks as effectively and efficiently as possible. When someone who is paid a salary so that [he] will contribute to an agency's effective operation begins to do or say things that detract from the agency's effective operation, the government employer must have some power to restrain [him].

Id. at 1887-88. Thus, the Supreme Court has held that the governmental interest in restricting employee speech when it interferes with the effective and efficient achievement of its goals is substantial. *Id.* at 1888.

Defendants assert that their interest in maintaining discipline, loyalty, confidentiality, and respect for departmental orders outweighs any corresponding interest held by Lickiss. In balancing Lickiss' interest in his statements against Defendants' substantial interest in effective and efficient law enforcement, the Seventh Circuit has posed the following factors for consideration:

> (1) whether the statement would create problems in maintaining discipline by immediate supervisors or harmony among co-workers; (2) whether the employment relationship is one in which personal loyalty and confidence are necessary; (3) whether the speech impeded the employee's ability to perform her daily responsibilities; (4) the time, place, and manner of the speech; (5) the context in which the underlying dispute arose; (6) whether the matter was one on which debate was vital to informed decision-making; and (7) whether the speaker should be regarded as a member of the general public.

Jefferson v. Ambroz, 90 F.3d 1291, 1297 (7th Cir. 1996); *Campbell*, 99 F.3d at 829. The Court must be mindful

that one purpose of this inquiry "is to 'ensure that public employers do not use [their] authority . . . to silence discourse [on matters of public concern], not because it hampers public functions but simply because [they] disagree with the content of employees' speech.'" *Campbell*, 99 F.3d at 829, *quoting Rankin v. McPherson*, 483 U.S. 378, 107 S.Ct. 2891, 2899 (1987).

In this case, whether or not Drexler issued a direct order that Lickiss cease all investigation of Steinborn, it is clear Lickiss ignored his admitted understanding that he was not to pursue further investigation of the matter. His purported rationale was that Drexler was not fulfilling her responsibilities as Sheriff and was attempting to cover up misconduct in the department. Thus, it seems obvious that Lickiss' conduct would likely create problems in maintaining discipline among Drexler's subordinates and disrupt the effective functioning of the department.

Likewise, "[i]t surely cannot be doubted that individuals who work in the highest echelons of the command of a police department must be assured of the loyalty of their immediate subordinates, as these subordinates are entrusted with carrying out their orders. . . ." *Campbell*, 99 F.3d at 830. In light of Lickiss' admitted understanding that he was not to be involved in any further investigation of the Steinborn/Lund matter, the fact that Lickiss then proceeded to prepare two memoranda and a letter to another candidate in the race for Sheriff criticizing Drexler's performance and response to the situation without even mentioning his activities to Drexler could reasonably have caused Drexler to doubt Lickiss' loyalty and ability to follow orders. The newspaper article, which was partially attributed to Lickiss

and appeared to track his initial report, would only augment her doubts. Thus, Defendants' have a strong interest in being able to regulate the kind of conduct in which Lickiss engaged.

It would be unreasonable to demand complete agreement with every position taken by an employer, but "at a certain point the department's position must be set firmly if the department is to function." *Wright v. Illinois Department of Children & Family Services*, 40 F.3d 1492, 1504 (7th Cir. 1994). Departmental decision makers are therefore vested with the ability to "punish thirteenth-hour efforts to undermine their authority and disrupt the functioning of their offices by subordinates seeking to undercut final decisions with which they disagree." *Id.* Thus, if Drexler actually disciplined Lickiss for disregarding her directions and attempting to undermine her authority with both the department and the public, her actions would have been justified.

However, since suspending Lickiss, Drexler has offered several rationales as justification for the discipline, some of which may be considered pretextual when considered in the entire context of the situation, and has attempted to shift the responsibility for the disciplinary decision away from herself. In the initial suspension letter dated October 19, 1994, Drexler listed the following as the bases of Lickiss' discipline: (1) unlawful release of information from an employee personnel file; (2) insubordination; (3) improper conduct while on duty; (4) cooperation in investigations; (5) criticism of employees or direct orders; (6) truthfulness; (7) intervention; and (8) political activities while on duty. The October 27, 1994 letter from Attorney Bruce Beal elaborates on these grounds, as well as violation of

department rules for failure to report information accurately, destruction of departmental records, failure to inform supervisors, failure to respect supervisors, failure to take responsible action, conduct unbecoming an officer, and failure to treat the public with courtesy.[5] Beal's letter also states that Lickiss was to have the opportunity to present his side of the story prior to final action on October 31, 1994, more than a week after the initial suspension. During her initial press conference, the only reason Drexler gave for Lickiss' suspension was that he had violated Steinborn's right to privacy by releasing information from Steinborn's personnel file in a report to the State's Attorney. This contention was later retracted. In her subsequent deposition, Drexler stated that she terminated Lickiss for violating her direct order, releasing information to the media, and engaging in political activity, among other things upon which she could not elaborate.

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[5] The letter indicates that the basis for the insubordination claim was Lickiss' reports to the State's Attorney on August 30, 1994 and September 7, 1994, as well as his contacting Lund directly. Lickiss' letter to the opposing candidate for Sheriff and alleged solicitation of a critical letter to the editor of the paper constituted the improper conduct while on duty, criticism of employees/direct orders, and political activity on duty. The charge of failure to cooperate in investigations was based on Lickiss' failure to notify Drexler of his continued involvement in the matter. The truthfulness allegation was based on his filing an allegedly false report regarding the Steinborn/Lund matter on October 11, 1994 and submitting an overtime request which purportedly misrepresented the nature of his work in order to conceal his continued involvement in the investigation. Lickiss was also charged with intervention for purportedly telling Lund to lie when questioned by departmental investigators.

There is evidence in the record that Drexler suspected at least one member of the County Board as being the source of the leak to the press, and Drexler admitted during her deposition that she had no real factual support linking Lickiss to the leaks. Furthermore, Hodgson testified that officers frequently responded to questions from reporters and sometimes used their computers for personal business without being disciplined. Hodgson then testified that he did not think that Lickiss should have been fired for composing his letter to the opposing candidate for Sheriff while on duty and did not demote him for this reason. There is also evidence in the record that Lickiss and members of the State's Attorney's office believed that Lickiss had a duty to provide further information on the Steinborn/Lund matter if he acquired such information. It is also somewhat curious that although Drexler claims that Lickiss' first supplemental report to Umholtz was in violation of her direct order to cease all investigations into the Steinborn matter, she did not verbally reprimand Lickiss or even mention it to him at that time.

State's Attorney Blanc testified in his deposition that he was troubled by the sudden shift in the departmental investigation from the conduct of Steinborn to the conduct of Lickiss. Along these lines, there is evidence in the record that Drexler treated Steinborn and Lickiss differently during their respective departmental investigations, talking to Steinborn personally prior to any disciplinary action (as was the standard department policy) and relying on his representations, while according Lickiss no such opportunity. Lickiss' statement was never taken during the investigation. Additionally, while Steinborn's conduct, which could have posed a

danger to public safety, was treated solely as an internal personnel matter, Lickiss' conduct was made the subject of a press conference. In this regard, Drexler testified to the somewhat illogical position that she considered Lickiss a greater threat to public safety than Steinborn because he could not be trusted to keep things quiet if ordered to do so.[6] Finally, Drexler confirmed that although Steinborn had done private things while on duty, some of which resulted in the initial complaint against him, he had not been disciplined for this behavior.

Furthermore, the reasonableness and extent of Defendants' pre-disciplinary investigation is also disputed, which also bears on Drexler's motivation in disciplining Lickiss. There is evidence in the record that until Lickiss' supplemental reports surfaced, Drexler was content to allow the "investigation" of Steinborn to remain idle. In fact, Drexler stated in her press conference on October 21, 1994 that she was reopening the investigation into the Steinborn case, giving rise to the inference that she considered the matter closed at that time. Members of the County Board were also critical of Drexler's handling of the situation and frustrated by her lack of responsiveness to their inquiries, which is marginally supportive of Lickiss' allegations of a cover-up.

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[6] The Court notes that Defendants' repeated attempts to downplay the potential seriousness of Steinborn's alleged instability is actually consistent with Lickiss' contention that Defendants attempted to conceal the situation and conducted a deliberately insufficient investigation.

From these facts, it would be possible to infer that Defendants were hostile to Lickiss as a result of his criticisms concerning the investigation and that the discipline he received was a result of this improper motivation rather than an attempt to maintain departmental discipline. A reasonable fact finder might therefore conclude that the disciplinary measures taken against Lickiss were in retaliation for conduct protected by the First Amendment. Thus, the Court finds that Lickiss has produced enough evidence to create an issue of material fact regarding Drexler's actual motivation in disciplining him.

Where, as here, an employer's motivation in disciplining an employee is reasonably in dispute, there remains a material issue of disputed fact that must be resolved by a jury. *Waters*, 114 S.Ct. at 1891. In resolving this issue, determinations of witness credibility, candor, and demeanor will be critical. Such determinations are not properly made by a court during summary judgment, but are the province of the jury at trial. Accordingly, Defendants' Motion for Summary Judgment with respect to Count I must be denied.[7]

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[7] As the Court finds that Lickiss has adequately raised a question about the genuineness of Defendants' motivation for his discipline, the Court cannot conclusively determine whether Defendants will be entitled to qualified immunity. *See Wright*, 40 F.3d at 1505-07; *Waters*, 114 S.Ct. at 1891. However, the law in this area is clear. If the evidence at trial demonstrates that Drexler was motivated by some improper purpose in disciplining Lickiss, then Defendants are not protected by qualified immunity. Alternatively, if the evidence establishes that Drexler was motivated only by a need to maintain discipline and effective law enforcement as she

(continued...)

II. Lickiss' Due Process Claim

The Fourteenth Amendment Due Process Clause provides: "No state . . . shall deny to any person life, liberty, or property, without due process of law." U.S. Const. Amend. XIV, § 1. Evaluating claims for the deprivation of procedural due process is a two-step process. A plaintiff must first establish a protected liberty or property interest. *Forbes v. Trigg*, 976 F.2d 308, 315 (7th Cir. 1992), *cert. denied*, 113 S.Ct. 1362 (1993). Defendants' Motion does not dispute that Lickiss may have had a constitutionally protected property interest in receiving his whole salary during the course of his employment, and, thus, that issue is conceded for purposes of their summary judgment motion.

The second question is whether the procedures provided Lickiss were constitutionally sufficient. "The essential requirements of due process . . . are notice and an opportunity to respond." *Cleveland Bd. of Educ. v. Loudermill*, 105 S.Ct. 1487, 1495 (1985). The Supreme Court explained that the due process clause of the Fourteenth Amendment provides that:

> The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee.

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[7] (...continued)
claims, then Defendants are entitled to a finding of no liability, not just qualified immunity.

Id.; *see also Domiano*, 904 F.2d at 1148 ("The due process clause requires that prior to the termination of a public employee with a property interest in his employment, the employer must give oral or written notice of the charges against the employee, explain the evidence against the employee, and give the employee an opportunity to present his side of the story to the employer.") In determining whether adequate due process has been provided, the Court must balance several factors, including:

> (1) the importance of the private interest at state; (2) the magnitude of the government's interest; and (3) the quality of the procedures employed in light of the relative strengths of the competing interests.

Swanson v. Village of Lake in the Hills, 962 F.2d 602, 604 (7th Cir. 1992), *citing Loudermill*, 105 S.Ct. at 1495.

Subsequent to the filing of Lickiss' Complaint, an arbitrator overturned the suspension and awarded Lickiss back pay and benefits for the relevant time period. In doing so, the arbitrator upheld Lickiss' demotion from sergeant to deputy and affirmed Defendants' position that back pay should be based on the rate paid a deputy. Lickiss now claims that he was denied due process when he was suspended without pay without an opportunity for a pre-deprivation hearing. Defendants contend that Lickiss is merely attempting to obtain review of the arbitrator's decision awarding him partial restitution. However, Lickiss responds that he does not seek review of the arbitrator's award, which is relevant only as to his actual out-of-pocket loss and

does not impede his ability to seek compensation in the form of damages for the violation of his constitutional rights.[8]

The Supreme Court, in addressing this issue, has held that:

> [A]lthough arbitration is well suited to resolving contractual disputes . . . it cannot provide an adequate substitute for a judicial proceeding in protecting the federal statutory and constitutional rights that § 1983 is designed to safeguard. As a result, according preclusive effect to an arbitration award in a subsequent § 1983 action would undermine that statute's efficacy in protecting federal rights.

McDonald v. City of West Branch, Michigan, et al., 466 US. 284, 104 S.Ct. 1799, 1803 (1984). This decision was premised upon the Supreme Court's determination that arbitrators are not experts in constitutional law, derive authority solely from the contracts in issue, and conduct a level of fact finding that is somewhat less exacting than judicial fact finding. *Id.* at 1803-04. Accordingly, the Court rejects Defendants' position and finds that, while the prior arbitral decisions in this matter

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[8] Presumably, the parties submitted this matter to arbitration pursuant to the terms of a collective bargaining agreement. Although the right to seek constitutional relief may in some circumstances be expressly waived in the arbitration provisions of the collective bargaining agreement, Defendants do not make that argument and there is no other evidence to that effect before the Court. As the record is silent in this respect, the Court therefore assumes that Lickiss did not voluntarily waive his right to bring this action by virtue of submitting to arbitration.

may be introduced as evidence in this action, they will not be afforded res judicata or collateral estoppel effect on the issue now before the Court.[9] *See McDonald*, 104 S.Ct. at 1804 n.13.

Defendants next contend that Lickiss was not denied procedural due process because the law only requires notice and a hearing prior to termination and he was only suspended without pay. Suspending police officers without pay deprives them of their property interest in their employment, and "the fact that benefits have merely been suspended briefly, rather than terminated, has never kept the state's action from being characterized as a deprivation." *D'Acquisto v. Washington*, 640 F.Supp. 594, 610 (N.D.III. 1986), *citing Confederation of Police v. City of Chicago*, 547 F.2d 375, 376 (7th Cir.), *cert. denied*, 431 U.S. 915, 97 S.Ct. 2175 (1977). Accordingly, suspension as well as discharge implicates due process rights. *Confederation of Police*, 547 F.2d at 376.

"One essential principle of due process is that an individual facing a deprivation be given 'some kind of hearing,'" presumably prior to the deprivation. *D'Acquisto*, 640 F.Supp. at 612, *quoting Loudermill*, 105 S.Ct. at 1493. However, if the interest of the employee is "sig-

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[9] Defendants rely on the Seventh Circuit's decision in *Papapetropoulos v. Milwaukee Transport Services*, 795 F.2d 591, 596-97 (7th Cir. 1986). However, their reliance is misplaced, as that case involved a § 1983 action seeking review of a purported denial of procedural due process with respect to the actual decision of the arbitrator, rather than a claim for damages as a result of a deprivation of constitutional due process rights by an employer that is separate and distinct from the issues resolved in the prior arbitration.

nificantly weaker" than that of the government employer, "a hearing which comes only after the deprivation has occurred is constitutionally adequate." *Id.* Similarly, even a substantial interest in employment can be overridden "in limited cases" by a particularly strong need for quick action on the part of the employer, "accompanied by a substantial assurance that the deprivation is not baseless or unwarranted," provided that a post-deprivation hearing follows promptly. *Jones v. City of Gary, Indiana*, 57 F.3d 1435, 1441 (7th Cir. 1995); *D'Acquisto*, 640 F.Supp. at 613.

Here, Defendants' interest in maintaining discipline and removing a purportedly untrustworthy public employee is strong. On the other hand, Lickiss' interest in retaining employment is also substantial. *Loudermill*, 105 S.Ct. at 1494. Although the suspension was relatively short-term, he was denied any opportunity to present his side of the case prior to Drexler's decision to suspend him without pay. *See Harrison v. City of Greenfield, Indiana*, 966 F.2d 315, 317 (7th Cir. 1992) (affirming holding of district court that where the employee is given some kind of opportunity answer charges prior to the decision to discipline, a short-term suspension does not require a pre-deprivation proceeding before a neutral party.) The question then is whether Defendants' interest is so strong that it overrides Lickiss' interests, demands prompt action, and justifies postponing his opportunity to be heard until after the initial deprivation.

Cases in which post-deprivation process has been found constitutionally sufficient have involved significant considerations for public safety justifying immedi-

ate action by the employer. *See D'Acquisto*, 640 F.Supp. 594 (involving police officers suspended for accepting bribes in the investigation of hit and run accidents and other violations); *Domiano*, 904 F.2d 1142 (holding that post-disciplinary hearing would be sufficient if fire chief's adamant refusal to follow the Village's emergency medical treatment policy and attempt to influence others reasonably posed a threat to public safety); *Jones*, 57 F.3d 1435 (need for fully staffed fire department sufficient to justify immediate action against firefighter who failed to report for his scheduled shifts); *Panozzo v. Rhoads*, 905 F.2d 135 (7th Cir. 1990) (police officer's absenteeism and repeated failure to appear in court as scheduled justified immediate suspension without pay where pretermination hearing occurred the next day); *Gilbert v. Homar*, ___ S.Ct. ___, 1997 WL 303380 (June 9, 1997) (immediate suspension justified where police officer had been charged with a felony because arrest and filing of criminal charges assured that purposes normally served by pre-suspension hearing had been met.)

The record in this case lacks a similar sense of urgency which would qualify this as an exceptional case in which the temporary abridgement of Lickiss' rights would be justified. Even when viewed in the light most favorable to Defendants, Lickiss was at best guilty of insubordination. There are no facts before the Court indicating that Lickiss engaged in criminal activity or conduct which was subversive to the interests of justice, posed any danger to public safety, or suffered from chronic absenteeism from his scheduled shifts. Rather, this would seem to be one of the situations perceived by the Court in *Loudermill* in which an employer purport-

edly perceives some hazard in keeping the employee on the job that does not reasonably justify immediate discipline without due process. In such a situation, the Supreme Court stated that an appropriate course of action would be to suspend with pay pending a hearing. *Loudermill*, 105 S.Ct. at 1495.

Lickiss had personal, financial, and professional interests in maintaining his employment with the Sheriff's Department that are entitled to great weight. Drexler's chosen method in dealing with the situation apparently failed to provide Lickiss with even the barest form of notice prior to his suspension, resulting in a fair risk of an erroneous deprivation. Furthermore, the fact that Hodgson later found it appropriate to reinstate Lickiss suggests that significant amounts of time and expense may have been avoided had Lickiss been given a pre-suspension hearing. Under the facts of this case, either a suspension with pay pending a hearing or a pre-suspension hearing would not have been unduly burdensome on Defendants in either a fiscal or administrative sense.[10]

The Court therefore concludes that under these circumstances, the governmental interest did not outweigh Lickiss' interests, thus rendering the post-deprivation process constitutionally insufficient. Accordingly,

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[10] Having concluded that any belief by Drexler that the situation with Lickiss posed such a danger that immediate suspension without procedural due process was justified was not objectively reasonable based on the clearly established state of the law at that time, which included cases such as *Loudermill*, *D'Acquisto*, *Domiano*, and *Panozzo*, the Court rejects Defendants' affirmative defense of qualified immunity on this claim.

Lickiss may proceed to trial with respect to his claim for damages as a result of his suspension without notice and an opportunity to be heard. Defendants' Motion for Summary Judgment is consequently denied with respect to Count II of the Complaint.

CONCLUSION

For the reasons set forth herein, Defendants' Motion for Summary Judgment [#90] is DENIED. This case is now ready to be set for a final pre-trial conference.

ENTERED this 17th day of June, 1997.

/s/ Michael M. Mihm
Michael M. Mihm
Chief United States District Judge